

8-3100-9053-2

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Gary C. Knapper,

Petitioner,

v.

Southwest and West Central  
Educational Cooperative  
Service Units,

Respondent.

FINDINGS OF FACT,  
CONCLUSIONS AND RECOMMENDATION

The above-captioned matter came on for hearing before Administrative Law Judge Jon L. Lunde commencing at 9:30 a.m. on October 27, 1994, at the Lyon County Courthouse in Marshall, Minnesota. The hearing was held pursuant to Notice of Petition and Order for Hearing dated August 23, 1994. The record closed on October 31, 1994, when an Exhibit the parties agreed could be made part of the record was filed.

Patricia A. Maloney, Ratwik, Roszak, Bergstrom & Maloney, P.A., Attorneys at Law, 300 Peavey Building, 730 Second Avenue South, Minneapolis, Minnesota 55402, appeared on behalf of the Respondent. Gary C. Knapper, 700 South 9th Street, #1, Montevideo, Minnesota 56265, was present at the hearing. He appeared on his own behalf.

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Veterans Affairs will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Gerald Bender, Minnesota Department of Veterans Affairs, 20 South 12th Street, 2nd Floor, Veterans Service Building, St. Paul, Minnesota 55155, telephone (612) 297-5828, to ascertain the procedure for filing exceptions or presenting argument.

### STATEMENT OF ISSUE

The issue in this case is whether the Respondent acted in good faith when it abolished an administrative position causing the Petitioner's loss of employment when he was bumped by the person who held the abolished position.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

### FINDINGS OF FACT

1. The Petitioner, Gary C. Knapper, is an honorably discharged veteran of the United States Air Force. He entered active military service on August 30, 1968 and served for more than seven years.

2. The Southwest and West Central Educational Cooperative Service Unit is one of ten educational cooperative service units (ECSUs) in the state of Minnesota. It provides services to its members that the members can't effectively or efficiently provide for themselves. Respondent serves an 18 county area in Minnesota and has approximately 120 members. Most of its members are independent school districts but some are municipalities.

3. One of the services Respondent has historically provided to its members is a cooperative purchasing program (CPP). Under the CPP, Respondent made bulk purchases of equipment and supplies used by participating members. The objective was to effectuate savings for Respondent's members through voluntary purchasing.

4. Respondent warehoused the equipment and supplies purchased under the CPP at its media center in Montevideo, Minnesota. Members would order cooperatively-purchased equipment and supplies from the media center and Respondent's employees would deliver them. Respondent sold the equipment and supplies at a markup to cover its operating expenses.

5. On March 22, 1989, Respondent hired Petitioner as a temporary van driver for the CPP. Ex. 16. On August 14, 1989, Respondent became a full-time van driver and warehouse person. Id. He worked at the media center throughout his employment. Most of his time was spent delivering materials to member school districts. Ex. 17. The materials included equipment and supplies ordered from the CPP and media center materials, such as films.

6. The CPP has had financial problems since the time Petitioner was hired. Ex. 2. Its annual deficits since June 30, 1990 have been as follows:

FISCAL YEAR ENDING DATE

DEFICIT

June 30, 1990	\$ 20,634
June 30, 1991	\$106,361
June 30, 1992	\$124,675
June 30, 1993	\$ 91,543
June 30, 1994	\$ 87,520

Ex. 6, 7 and 8. Respondent's board of directors (Board) was concerned with CPP deficits because they reduced general fund balances and monies available for educational purposes.

7. On July 31, 1991, the CPP fund deficits and methods for making the fund solvent were discussed at length by the Board. Among other things, the Board considered elimination of the program. Ex. 2. That was not done, but in August 1991, the Board explored making its cooperative purchases jointly with another ECSU to further reduce the cost of supplies and equipment. Ex. 3. Also, a committee of school superintendents was appointed to study the CPP deficit problem. Ex. 4. Pending completion of the study, during the 1991-1992 school year, one position in the CPP was eliminated to reduce the deficit. Ex. 6.

8. During the 1993-94 school year, further cuts were made in the CPP staff hours in order to reduce the CPP deficit. Ex. 8. Also, after studying the problem, Respondent's deputy executive director, Lee C. Warne, recommended that the Board reduce the number of CPP employees in order to reduce the CPP fund deficit. Warne believed a reduction in staff was appropriate because Respondent was reducing the warehousing and delivery of equipment and supplies to school districts. The old system for storing and delivering cooperatively purchased equipment and supplies was being replaced by a direct-ship program under which members ordered equipment and supplies directly from a vendor who then delivered the product. Ex. 10.

9. During the 1993-94 school year, five full-time employees worked in the CPP: a coordinator, Jay Bechtle; an assistant coordinator, Janet Wibben; a secretary, Katherine Vicken; and two van drivers, David Saue and Petitioner. Ex. 12. Petitioner was the least senior employee. Ex. 16.

10. At the end of the 1993-94 school year, Petitioner was laid off for the summer. Initially, this was intended to be a temporary layoff. Petitioner had also been laid off the previous summer, but due to employee absences and injuries he had nearly worked full time in spite of his layoff.

11. At its meeting on July 27, 1994, the Board implemented Warne's suggestion to reduce the number of employees in the CPP. It eliminated Bechtle's coordinator position effective September 1, 1994 and allowed Bechtle to bump Petitioner, who had less seniority. Petitioner was placed on permanent layoff effective June 28, 1994. Ex. 13. The Board had already reduced Vicken's position in the CPP by 80 percent so that she worked only one day weekly in the CPP. Ex. 12. These actions reduced the CPP staff by 1.8 full-time equivalents. Elimination of the coordinator's position alone resulted in net salary savings for the 1994-95 school year of approximately \$25,000, even though Bechtle was paid more as a van driver than Petitioner would have been paid.

12. Bechtle was first employed by Respondent as a van driver and warehouse worker on June 27, 1984. When Bechtle advanced, Petitioner was originally hired to replace him. The Board eliminated Bechtle's position

rather than Wibben's because Wibben had knowledge, skills, and abilities working with computers. This was a critical function that Bechtle was unable to perform. Furthermore, Wibben had sales experience equivalent to Bechtle.

13. On July 11, 1994, Petitioner received written notice of his permanent layoff and his right to challenge the layoff by petitioning the District Court for a writ of mandamus or by requesting a hearing from the Commissioner of Veterans Affairs. On or about July 27, 1994, Petitioner filed a Petition with the Commissioner of Veterans Affairs arguing that his layoff was not made in good faith.

14. Respondent's staff cuts, including the elimination of the coordinator's position, and Petitioner's layoff, were made by the Respondent only to reduce the CPP deficit.

15. Respondent has a written labor agreement with the Classified Staff Employees Association. Petitioner and the Respondent's other employees are covered by the agreement. The agreement has a seniority provision. It states:

Seniority shall be determined for each employee within his or her job classification based upon total continuous length of full-time service in the ECSU. \* \* \* When a position is cut, the least senior employee in that job classification at that site shall be the first person laid off, provided: 1) that the senior person whose position is cut has the necessary skills to move into the less senior person's continuing position, and 2) that the continuing position's supervisor approved of the move as is.

15. The labor agreement also contains a grievance procedure covering disputes or disagreements between the employees and the Board as to the interpretation and application of the terms and conditions of employment insofar as such matters are contained in the personnel policies. Petitioner did not file a grievance under the labor agreement concerning his layoff.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have authority to determine if the Petitioner was laid off from his employment as a van driver in good faith under Minn. Stat. §§ 197.481 and 14.50 (1992).

2. The Petitioner and the Respondent received timely and proper notice of the hearing.

3. The Department of Veterans Affairs has complied with all relevant substantive and procedural requirements of law.

4. Petitioner is a veteran within the meaning of Minn. Stat. §§ 197.46 and 197.46 (1992).

5. The Respondent is a political subdivision of the State of Minnesota for purposes of Minn. Stat. §§ 197.455 and 197.46 (1992), pursuant to the provisions of Minn. Stat. § 123.58, subd. 6(c) (1992), which provides that

ECSUs are governed by the laws applicable to independent school districts in the hiring and termination of employees.

6. Job eliminations made in good faith and not as a subterfuge to oust a veteran from his employment are not covered by Minn. Stat. § 197.46, which generally prohibits the removal of a veteran from his employment except for incompetency or misconduct shown after a hearing.



7. An employer, which has eliminated a position in good faith, may follow written or unwritten seniority principles in determining which employee will ultimately be dismissed. State v. City of Duluth, 262 N.W. 681, 82 (1935).

8. Respondent eliminated Bechtel's job in good faith and permissibly used seniority principles in determining that Petitioner should be bumped.

9. Respondent did not violate the Veterans Preference Act when it placed Petitioner on permanent layoff.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Commissioner of the Minnesota Department of Veterans Affairs DISMISS the Petitioner's Petition WITH PREJUDICE.

Dated this \_\_\_\_ day of November, 1994.

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JON L. LUNDE  
Administrative Law Judge

#### NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped, two tapes.

#### MEMORANDUM

Under Minn. Stat. § 197.46, veterans generally cannot be removed from their position or employment except for incompetency or misconduct shown after a hearing, upon due notice and written charges. In interpreting the statute, the courts have held that veterans can be terminated or demoted if their position has been eliminated in good faith. State ex. rel. Caffrey v. Metropolitan Airports Comm'n., 246 N.W.2d 637, 641 (Minn. 1976); State ex.

Boyd v. Matson, 155 Minn. 137 (Minn. 1923); State ex rel. Evens v. City of Duluth, 262 N.W. 681 (Minn. 1935).

In this case, Bechtle's position was eliminated to reduce the CPP deficit. The decision to eliminate Bechtle's position was made in good faith. As a result of the elimination of his position, Bechtle bumped

Petitioner, a less-senior employee. Petitioner was permanently laied off. Petitioner does not challenge Bechtle's right to bump him and did not file a grievance regarding Bechtle's bumping rights under the labor agreement. Nonetheless, the circumstances warrant some discussion.

In the Matson case, the court held that the Veterans Preference Act does not prevent an employer from abolishing a veteran's position and terminating the veteran's employment if it acts in good faith and not merely for the purpose of ousting the veteran. In that case, a veteran with less seniority than other operators was discharged when the employer reduced the number of operator positions. The employer discharged the less-senior operators pursuant to a civil service rule which required that layoffs be based on seniority.

In Evens, the employer abolished one of two assistant fire warden positions and laid off the assistant fire warden, a veteran with less seniority. The court held that the Veterans Preference Act did not apply to the elimination of the position because elimination was based on lack of funds alone. Further, the court held that the employer could lawfully decide which assistant should be discharged based on unwritten seniority principles. It stated, in part:

. . . what a municipal counsel may do under formal written rules of its own making, it may do also under an unwritten rule of conduct, where the latter is such a well-recognized principle of economic and industrial action as that which gives priority to a senior over a junior employee, when must leave the common employment, not because incompetenct or relative inefficiency, but solely on account of a reduction in force.

State ex rel. Evens v. City of Duluth, supra, 262 N.W. at 682.

In this case, Petitioner's position was not eliminated. Instead, the coordinator's position was eliminated and the coordinator was permitted to bump the Petitioner because the coordinator had more seniority. The Respondent asserted that the coordinator was permitted to bump the Petitioner under the terms of the labor agreement. When a veteran loses his employment following employer's good faith elimination of a position pursuant to the bumping provisions in a labor agreement, it is doubtful that the employee has been dismissed for purposes of the Veterans Preference Act. Being bumped pursuant to the terms of the labor agreement is tantamount to a constructive voluntary termination.<sup>1</sup>

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1. It has been held, for example, that an employee who is bumped from his position pursuant to the seniority provisions of a collective bargaining agreement is deemed to have voluntarily quit his employment for purposes of unemployment compensation entitlement. Jansen v. Peoples Elec. Co. Inc., 317 N.W.2d 879 (Minn. 1982); Anson v. Fisher Amusement Corporation, 93 N.W.2d 815 (Minn. 1958).

However, the seniority provisions in the labor agreement do not clearly apply in this case. The agreement states that when a position is cut, the least senior employee "in that job classification" shall be the first person laid off. Bechtle did not have the same job title as the Petitioner, and it is unclear if he was considered to be in the same job classification. The labor agreement states that when a position is eliminated, the least-senior person in the job classification shall be laid off but only if "the senior person whose position is cut has the necessary skills to move into the less senior person's continuing position." One would normally assume that two persons with the same job title would both have the necessary skills to perform the job. The fact that the agreement supposes that they might not suggests that job classifications are different from job titles.

Assuming, however, that the labor agreement is inapplicable to the bump which occurred in this case, the Administrative Law Judge is persuaded that the Respondent can permit a nonveteran whose position is eliminated to bump a less senior employee if it does so in good faith. It is generally recognized by Minnesota Courts that seniority is a recognized and permissible basis for determining who will be laid off when positions are eliminated. In this case, the person who bumped Petitioner formerly held Petitioner's job, had all the skills Petitioner had, and had greater seniority. The Administrative Law Judge is persuaded that Respondent's application of seniority principles following the good faith elimination of the coordinator's position did not constitute removal for purposes of the Veterans Preference Act.

Petitioner argued that he could have been retained because the Respondent got a new contract generating revenues which exceeded the amount of his salary and he questioned how the Respondent could have an assistant coordinator position but no coordinator. Effective August 1, 1994, Respondent executed a new contract with the Pioneer Land Library System under which Respondent would deliver books to schools. However, this contract did not solve the Respondent's deficit problem. Furthermore, the Respondent is not required to do everything possible to retain a veteran. It has discretion to determine whether, for business reasons, staff should be reduced. If done in good faith, such a reduction is permissible. The fact that the coordinator's position was eliminated and the assistant coordinator no longer has a coordinator to assist is irrelevant. The title of Wibben's position has no bearing on the Board's good faith in eliminating Bechtle's position.

Petitioner also argued that his job was performed by others during the summer of 1994 and that there was no reason why Bechtle should have worked during the summer at his higher rate of pay. It is immaterial that van driver work was available during the summer of 1994 or that Bechtle and another employee worked part of the summer driving vans. Bechtle's job was to perform that job duty. The other employee was also required to drive vans when he was needed. Although the Respondent could have eliminated Bechtle's coordinator

position when Petitioner was originally placed on summer layoff, it was not required to do that. Petitioner was already on summer layoff and, for all practical purposes, his permanent layoff became effective with the commencement of the 1994-95 school year. Under all the circumstances, the Administrative Law Judge is persuaded that the Respondent acted in good faith and did not violate the Vetean's Preference Act by eliminating Bechtle's position and permitting Bechtle to bump Petitioner because Bechtle had greater seniority

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